No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 14, 1989

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MOTION OF THE AMERICAN SOCIETY OF PENSION ACTUARIES TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The American Society of Pension Actuaries (ASPA) hereby moves the Court pursuant to Supreme Court Rule 36.1 for leave to file the accompanying brief as *Amicus Curiae* in support of Petitioner.

In support of the motion, ASPA states as follows:

1. Both PBGC and LTV have given written consent to the filing of a brief by ASPA; however, ASPA has not had the opportunity to contact the other parties in this case. Consequently, this motion is necessary.

2. ASPA is a non-profit corporation established under 501(c)(6) of the Internal Revenue Code. ASPA has roughly 3,000 members nationwide, who provide actuarial, consulting, and administrative services to approximately 30 percent of the qualified retirement plans in the United States. A substantial number of these plans are single-employer defined benefit plans and thus subject to the PBGC single-employer insurance program, which is the subject matter of this case.

3. ASPA is an interested party because a decision upholding the conclusion of the Second Circuit Court of Appeals would result in higher PBGC premiums and thus negatively impact the single-employer defined benefit pension system. The preservation of this pension system is of vital concern to our members and is critical to our country's ability to provide adequate retirement income.

4. We believe our extensive experience in the operations of single-employer defined benefit plans in general, and the operations of PBGC in particular, enables us to provide this Court with valuable information.

WHEREFORE, ASPA respectfully requests leave to file the accompanying brief as *amicus curiae*.

Dated: December 14, 1989

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QUESTIONS PRESENTED

1. May a reviewing court vacate a restoration decision under Section 4047 of ERISA because PBGC failed to defer to policies underlying the bankruptcy and labor laws?

2. May a reviewing court substitute its judgment for PBGC's as to the appropriate standard for restoration on the basis of improved financial circumstances?

3. May a reviewing court substitute its judgment for PBGC's as to the appropriate procedures to be followed in informal adjudication?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Society of Pension Actuaries submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States in support of the petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 875 F. 2d 1008. The appeal was taken from the judgment of the United States District Court for the Southern District of New York dated September 13, 1988.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on May 12, 1989. PBGC timely filed its Petition for Writ of Certiorari on September 11, 1989, and this Court granted the Writ on October 30, 1989.

STATEMENT OF THE CASE

LTV Corporation (LTV) sponsored three defined benefit plans (Plans) subject to the PBGC single-employer insurance program. In December 1986, LTV advised PBGC that it was unable to continue to fund these Plans. PBGC's internal working group estimated that the $2.1 billion in the Plans' underfunding would increase substantially unless the Plans were immediately terminated. With LTV's consent, the Plans were terminated by PBGC effective January 13, 1987. The Court of Appeals for the Second Circuit upheld the termination of the Plans against the challenge of the United Steel Workers of America (USWA) and noted that PBGC could restore the Plans if subsequent events justified such action. *Jones & Laughlin Hourly Pension Plan v. The LTV Corp.*, 824 F.2d 197, 202 (2d Cir. 1987).

On September 22, 1987, the Executive Director of PBGC issued a Notice of Restoration for these Plans based on LTV's establishment of follow-on plans and its financial improvement. The United States District Court for the Southern District of New York vacated the Notice of Restoration and PBGC appealed. The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court and PBGC filed a timely appeal from that decision.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Society of Pension Actuaries (ASPA) is a non-profit organization with about 3,000 members who provide actuarial, consulting, and administrative services to approximately 30 percent of the qualified retirement plans in the United States. A substantial number of these plans are single-employer defined benefit plans subject to the PBGC termination insurance program. It is our view that a decision against PBGC in the instant case would have a substantial negative effect on the PBGC single-employer insurance program and on the defined benefit pension system in general.

The immediate impact of a decision adverse to PBGC would be that PBGC would be responsible for about an additional $2 billion in unfunded liabilities of the Plans. PBGC could attempt to recover 75 percent of this amount from LTV, but historically such recoveries have been very limited. Accordingly, PBGC would lose, at a minimum, approximately 1/2 billion dollars if the Plans are not restored. Since the single-employer insurance program is primarily funded by premiums from participating employers, it is apparent that a premium increase would ultimately be necessary to cover this cost and the cost of similar cases. By way of background, it should be noted that when PBGC first began operations in 1974, the premium was $1 per participant. Plan sponsors now pay a premium of between $16 and $50. Thus, there has already been a very significant increase in the premium expense for sponsors of voluntary single-employer defined benefit plans.

In recent years, there have been many difficulties confronting defined benefit plans, which provide the most secure retirement benefits to employees. Single-employer defined benefit plans cover approximately 30 million individuals. In recent years, the laws affecting the defined benefit system have been changed with great frequency and sponsors of such plans have been confronted with substantially increased compliance and administrative costs. As a result, the percentage of American workers covered under defined benefit plans has decreased significantly in the 1980s. An increase in PBGC premiums

resulting from a decision adverse to PBGC in this case would aggravate this situation and make it more difficult for the private pension system to provide adequate retirement benefits.

There is another aspect of this case which is very disturbing--the standard for statutory construction that has been utilized by the Court of Appeals for the Second Circuit. In its discussion of the merits the Second Circuit stated, "Although this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." The Second Circuit stated further that "PBGC focused inordinately on ERISA." ASPA submits that such a standard for statutory construction is not only legally inappropriate, but will also produce significant practical difficulties both for PBGC and other government agencies, and for the public who must deal with these agencies. Rather than accept the clear meaning of a statute, which is not in conflict with other statutes, the Court of Appeals has employed a convoluted process which attempts to ascertain the purposes of statutes not under consideration in its review of the application of the pertinent statute to the facts in the instant case. It is critical for the proper functioning of our legal system that judgments be made with reasonable certainty as to the meaning of a statute. The standard employed by the Court of Appeals would inject a huge degree of uncertainty into any effort to make a determination as to the authority of PBGC or of any government agency. Such uncertainty would be severely disruptive to the efforts of PBGC and other government agencies to administer federal statutes, and of the public to comply with them since, utilizing the Court of Appeal's standard, courts could construct unanticipated interpretations without regard to the clarity of any specific statute.

SUMMARY OF ARGUMENT

A. PBGC HAS BEEN GRANTED BROAD AUTHORITY TO RESTORE PLANS UNDER ERISA § 4047 AND IT IS INAPPROPRIATE TO REQUIRE DEFERENCE TO POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

B. IT IS INAPPROPRIATE FOR THE SECOND CIRCUIT COURT OF APPEALS TO SUBSTITUTE ITS JUDGMENT FOR PBGC'S AS TO THE APPROPRIATE STANDARD FOR RESTORATION ON THE BASIS OF IMPROVED FINANCIAL CIRCUMSTANCES.

C. A GOVERNMENT AGENCY SHOULD BE ACCORDED SIGNIFICANT LATITUDE AS TO THE APPROPRIATE PROCEDURES USED IN INFORMAL ADJUDICATION, BARRING A VIOLATION OF FUNDAMENTAL FAIRNESS. THE RECORD OF THIS CASE DOES NOT INDICATE THAT THERE HAS BEEN SUCH A VIOLATION.

ARGUMENT

A. PBGC HAS BEEN GRANTED BROAD AUTHORITY TO RESTORE PLANS UNDER ERISA § 4047 AND IT IS INAPPROPRIATE TO REQUIRE DEFERENCE TO POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

Congress has expressly granted to PBGC broad authority to restore terminated plans. Section 4047 of ERISA states:

> In the case of a plan which has been terminated under section 4041 or 4042, the corporation, [PBGC], is authorized in any such case in which the corporation, [PBGC], determines such action to be appropriate and consistent with its duties under this title [Title IV of ERISA], to take such action as may be necessary to restore a plan to its pretermination status....

[Emphasis added]. The above statutory language clearly provides PBGC with broad authority to restore a plan if such action is appropriate and consistent with its duties under ERISA. Two of its specific duties, as provided in Section 4002(a), are to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, and to maintain premiums established by PBGC under Section 4006 at the lowest level consistent with carrying out its obligations under this title.

In a situation such as this one, where the available financial evidence indicates a change for the better in the financial circumstances of the plan sponsor, it is clearly appropriate and consistent with its duties for PBGC to restore the plan in order to minimize its financial burden, and thus keep premiums at the lowest possible level. Such restoration would also serve to encourage the continuation and maintenance of voluntary pension plans by reducing the potential burdens of higher premiums on plan sponsors at a time when such sponsors are already required to pay premiums which have increased significantly and when such sponsors also face a myriad of other problems resulting from changes in the pension laws.

Thus, PBGC clearly has the authority to restore the Plans in this situation.

The Second Circuit Court of Appeals stated, "Because ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and, to the extent possible, honored the policies underlying them." The Court of Appeals stated further, "In the instant case, a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other. Rather, PBGC focused inordinately on ERISA. This failure renders PBGC's decision arbitrary and capricious."

This is not a case in which there is a direct conflict between two statutes, which might justify the utilization of such an ambiguous standard of statutory interpretation. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). It is noted that the Court of Appeals did not hold that there was a violation of any provision of the bankruptcy or labor laws in PBGC's actions. Thus, the emphasis on the policies of other laws is unprecedented and improper in this situation.

The application of the standard utilized by the Second Circuit would result in great cost and confusion to both administrative agencies and the public. It would require that any administrative agency carefully consider and document every major area of law that could conceivably relate to its actions. Not only would this require incomprehensible amounts of time and financial resources on the part of the agencies, but it would create tremendous difficulties for those affected by agency actions to determine with any degree of certainty the appropriate scope of authority of any particular agency.

B. IT IS INAPPROPRIATE FOR THE SECOND CIRCUIT COURT OF APPEALS TO SUBSTITUTE ITS JUDGMENT FOR PBGC'S AS TO THE APPROPRIATE STANDARD FOR RESTORATION ON THE BASIS OF IMPROVED FINANCIAL CIRCUMSTANCES.

The Second Circuit Court of Appeals accepted a change in financial circumstances as an appropriate basis for plan restoration, but replaced PBGC's standard with one of its own--the "long term ability" of a company to fund its plan. The standard enunciated has no basis in ERISA, and is inconsistent with the principle that an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). More specifically, this Court stated in *Chevron* that a court must accept an agency's interpretation unless "the interpretation is expressly foreclosed by a clearly expressed legislative intent." Therefore, while statutory construction of an ambiguous statute is the function of the courts, its power to review an agency determination is limited. Where an agency administering a statute has determined the question of the specific application of a broad statutory term, that decision is to be accepted by the courts if it is reasonable. Furthermore, the long term ability to fund standard interferes with the "type of judgment which administrative agencies are best equipped to make." *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). It should be noted that PBGC has been analyzing the financial condition of plans and employers since 1974 and has determined that the kind of long-term predictions required by the Second Circuit Court of Appeals cannot be made on a reliable basis.

By August of 1987, PBGC determined that the financial factors on which it had relied in terminating the Plans had significantly changed. Among these factors cited by PBGC were that the steel industry was experiencing a dramatic financial turnaround, contrary to the predictions of experts in late 1986, and information submitted by LTV to its creditors indicated that LTV had substantially exceeded its business projections of operating income. Additionally, the establishment of follow-on plans by LTV at a substantial cost provided strong additional evidence of changed financial circumstances. These factors clearly indicate that PBGC's restoration of the Plans, on the basis of changed financial circumstances, was an appropriate one.

The PBGC has argued that there is yet another standard for restoration, what it terms the "abusive follow-on plans" standard. We believe this argument that "abusive follow-on plans" constitute a separate basis for restoration is misguided. It is our view that the establishment of follow-on plans provides evidence of changed financial circumstances and is not a separate standard for restoration. Rather, it should be viewed as subsumed in the changed financial circumstances standard. For example, in another case, a follow-on plan may involve a minimum expenditure of funds of the plan sponsor and there may be no other factors indicating a favorable change in financial circumstances. We do not believe that restoration would be reasonable in such a situation since the available evidence would not provide any indication that the plan sponsor would be able to fund the plan. In the instant case, however, there is ample evidence of changed financial circumstances, including the establishment of follow-on plans involving significant costs.

C. A GOVERNMENT AGENCY SHOULD BE ACCORDED SIGNIFICANT LATITUDE AS TO THE APPROPRIATE PROCEDURES USED IN INFORMAL ADJUDICATION, BARRING A VIOLATION OF FUNDAMENTAL FAIRNESS. THE RECORD OF THIS CASE DOES NOT INDICATE THAT THERE HAS BEEN SUCH A VIOLATION.

The Second Circuit Court of Appeals concluded that the procedures employed by PBGC to reach its restoration decision rendered the decision arbitary and capricious.

Section 4047 of ERISA does not prescribe any procedures to be followed by PBGC when reaching a restoration decision. Furthermore, this Court stated that imposing "rigid requirement[s] ... would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." 332 U.S. at 202. This Court also stated that "if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored

to reach what the court perceives to be the 'best' or 'correct' result, judicial review will be totally unpredictable." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978). Thus, this Court has recognized that agencies should be provided a significant degree of latitude in formulating their procedures, as long as the procedures employed are fundamentally fair. Applying this principle to the instant case, this Court should not reject PBGC's procedures on an arbitrary and capricious standard since the record does not reflect a failure to adhere to fundamental standards of fairness.

CONCLUSION

This Court should reverse the decision of the Second Circuit Court of Appeals and uphold PBGC's restoration of the Plans.

Respectfully Submitted,

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